Badan Pengurusan Bersama Subang Parkhomes v Zen Estates Sdn Bhd (Fadhlullah & Associates Consulting Engineers Sdn Bhd, third party)

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22C-7–03 OF 2020
WONG KIAN KHEONG JCA
31 DECEMBER 2024

Civil Procedure — Evidence — Expert evidence — Mode of tendering expert opinion — By way of witness statement or affidavit — Whether a party could tender expert opinion by way of witness statement and not by affidavit pursuant to O 40A r 3(1) and (2)(a) to (h) of Rules of Court 2012

Evidence — Adverse inference — Suppressing material evidence — Joint management body ('JMB') filed negligence action against developer for defects in common property — JMB did not call property manager — Developer did not adduce 'As-Built Drawings' and waterproofing warranty — Whether court should draw adverse inference — Evidence Act 1950 s 114(g)

Evidence — Expert evidence — Evidence of — Whether a party could tender expert opinion by way of witness statement and not by affidavit pursuant to O 40A r 3(1) and (2)(a) to (h) of the Rules of Court 2012 — Whether expert's witness statement relevant and admissible under ss 5, 7, and 45(1) of the Evidence Act 1950 — Whether existence of defects of condominium and their causes could be proven by expert evidence only — Evidence Act 1950 ss 5, 7, & 45(1)

Tort — Negligence — Negligence by developer — Joint management body ('JMB') filed negligence action against developer for defects in common property — Whether developer had delivered relevant documents to JMB as required by s 15(3) of Strata Management Act 2013 — Whether developer was liable to JMB for negligence — Whether developer owed duty of care to JMB — Whether JMB proven existence of defects of common property and their causes — Whether developer liable to JMB for tort of breach of statutory duty — Whether developer could rely on certificate of making good defects and expiry of defect liability period as defence — Whether JMB proven that loss or damage arising from developer's breach — Whether JMB could claim compensatory damages and exemplary damages from developer — Whether court could impose interest on compensatory damages awarded — Whether developer could claim for third-party indemnity against mechanical and electrical consultant engineers — Civil Law Act 1956,

ss 10(1), (2) & 11 — Electricity Regulations 1994, regs 36(1), 38(1) & (3) — Electricity Supply Act 1990 — Evidence Act 1950, ss 101(1), (2) & 102 — Limitation Act 1953, s 6(1)(a) — Rules of Court 2012, O 42 r 12 — Street, Drainage and Building Act 1974 — Strata Management Act 2013, ss 15(3) & 17(1) — Uniform Building By-laws 1984, by-laws 84(1), (4), (5) & 115

The present negligence action was filed by the joint management body ('the JMB/plaintiff') of Subang Parkhomes ('the condominium') against the developer of the condominium ('the developer/defendant') for defects in the condominium's common property ('the defects'). The plaintiff prayed for, inter alia, the following reliefs: (a) a declaration that the defendant had breached s 15(3) of the Strata Management Act 2013 ('the SMA'); and (b) orders that the defendant shall rectify all the defects and pay to the plaintiff the costs for partial rectification works in relation to the defects. The developer in turn filed a claim for a third-party indemnity from the mechanical and electrical consultant engineers who had been appointed by the developer for the construction of the condominium. The issues that arose in the present action were: (A) whether a party could tender an expert opinion by way of a witness statement and not by an affidavit pursuant to O 40A r 3(1) and (2)(a) to (h) of the Rules of Court 2012 ('the ROC') — this issue also concerned the relevancy and admissibility of the expert's witness statement under ss 5, 7, and 45(1) of the Evidence Act 1950 ('the EA'); (B) whether the defendant had delivered the relevant documents to the plaintiff as required by s 15(3) of the SMA ('the documents') — this issue was related to the High Court's order against the defendant for the discovery of documents regarding the maintenance and management of the condominium ('the High Court's discovery order'); (C) whether the defendant was liable to the plaintiff for the tort of negligence — in determining this issue, the sub-issues that arose were: (1) whether the defendant owed a duty of care to the plaintiff; (2) whether the existence of the defects of the condominium and their causes could be proven by expert evidence only; (3) whether the plaintiff had proven the existence of the defects of the common property and their causes; (4) whether the defendant had breached by-laws 84(1), (4), (5) and 115 of the Uniform Building By-laws 1984 ('the UBBL') as well as regs 36(1), 38(1) and (3) of Electricity Regulations 1994 ('the ER') ('the relevant provisions'),and if so, whether the defendant was additionally liable to the plaintiff for the tort of breach of statutory duty; (5) whether the defendant could rely on the certificate of making good defects ('the CMGD') issued by DW4 and the expiry of 'Defect Liability Period' ('DLP') as defence; (6) whether the plaintiff had proven, on a balance of probabilities, the loss or damage arising from the defendant's breach; (7) whether the court should draw adverse inference under s 114(g) of the EA, firstly, against the plaintiff for non-calling of the property manager, and secondly, against the defendant for not adducing the 'As-Built Drawings' and waterproofing warranty as material evidence at the trial; and (8) whether the plaintiff could claim from the defendant the following: (i) the partial rectification cost; the cost to rectify the

defects which had not been rectified by the defendant; any damage suffered by the plaintiff due to the defendant's non-compliance of the ER; and the plaintiff's loss of access, use and amenity of the common property due to the defects (collectively referred to as 'the compensatory damages'); and (ii) exemplary damages — in relation to this claim, the issue that arose was whether the defendant's breach of the High Court's discovery order could justify the court's imposition of exemplary damages on the defendant; and (D) whether the third-party was liable to indemnify with regard to the defendant's liability to the plaintiff in the present case.

Held:

(1) In relation to issue (A), the court found that, firstly, our case law had decided that to assist the court to decide a factual issue in a case, s 45(1) of the EA allowed expert evidence to be tendered. Secondly, DW4's witness statement and oral expert opinion were relevant and admissible under ss 5 and 7 of the EA. Thirdly, O 40A r 3(1) and (2) of the ROC were not mandatory. Notwithstanding the admissibility of DW4's witness statement and oral expert opinion, as well as the directory nature of O40A r 3(1) and (2) of the ROC, DW4 should have affirmed an affidavit in accordance with O 40A r 3(1) and (2) of the ROC, in particular sub-para (2)(h) (see paras 25–28).

(2) In the present case, the defendant did not adduce any evidence to show that the documents as required under s 15(3) of the SMA had been handed to the plaintiff. It was clear that the High Court's discovery order was final and res judicata, yet the defendant failed to comply with such order. Such a conduct by the defendant constituted a contempt of the discovery order. Based on the above evidence and reasons, the court granted a declaration that the defendant had failed to deliver to the plaintiff the documents as required under s 15(3) of the SMA (see paras 30–31).

(3) The court found that the defendant owed a duty of care to the plaintiff notwithstanding the fact that the plaintiff had yet to be established under s 17(1) of the SMA at the material time. This was because there was sufficient legal proximity between the parties with regard to the common property considering that it was reasonably foreseeable that if the defendant had breached the duty of care, the plaintiff would have suffered loss and damage. Further, public policy also strongly supported the imposition of the duty of care on the defendant. The fact that there was no contract between the plaintiff and the defendant was immaterial because the tort of negligence in itself was a cause of action which was independent of the non-existence of any contract between the parties (see paras 33–35).

(4) In any claim for defects in construction works, there was no requirement, either in the EA or Malaysian case law, for the claimant to adduce expert evidence under s 45(1) of the EA. Nonetheless, the parties may adduce expert opinions to assist the court regarding the existence of the defects of the condominium and their causes and it was up to the court to attach any weight to the expert opinion. However, if such existence and causes of the defects could be easily proven by non-expert witnesses and if a party ('Z') unnecessarily prolonged a trial and escalated costs by calling expert witness, the court had a discretion to impose costs with regard to such a conduct by Z under O 59 r 8(b) of the ROC (see paras 37–38).

(5) Any breach of the relevant provisions in itself could not form a basis for a claim for the tort of breach of statutory duty because a construction of the Street, Drainage and Building Act 1974 and the Electricity Supply Act 1990, the enabling Acts of Parliament for the UBBL and the ER respectively, did not show Parliament's intention to confer a right of private action on a plaintiff when the defendant had breached a duty imposed by the relevant provisions (see para 41).

(6) The court found as a fact that the plaintiff had successfully discharged the legal and evidential burden to prove the existence and causes of the defects on a balance of probabilities and consequently, the court found that the defendant's breach had occurred. The following evidence and reasons supported this factual decision: (a) the expert evidence of the plaintiff's experts, ie, PW6 and PW7 clearly proved the existence of the defects and their causes; (b) the expert testimonies of the defendant's experts, ie, DW2, DW3 and DW4, could not be accepted by the court because they did not inspect the common property and the electrical installations; (c) the defendant did not reply or deny the plaintiffs' letters regarding the defects and this omission was relevant under s 8(2) of the EA; and (d) despite the filing of the original action against the defendant, the defendant did not apply to the plaintiff for permission for the defendant's experts to inspect the condominium as to verify the existence and causes of the defects (see paras 43–45).

(7) The CMGD could constitute evidence of the defendant's rectification of the defects of the condominium but considering that the court had found as a fact that such defects existed and had not been rectified by the defendant, the court opined that the contents of the CMGD were not true and had been rebutted by the expert testimonies of PW6 and PW7. Further, the court found that the defendant could not rely on the expiry of the DLP as a defence. This was because the original action was premised on the tort of negligence. By virtue of s 6(1)(a) of the Limitation Act 1953, the plaintiff had a statutory right of six years to file this original action against the defendant based on the tort of negligence.

If the court accepted the expiry of the DLP as a defence to the defendant's breach, this would render redundant the said statutory six-year limitation period (see paras 46 & 49).

(8) The court found that the loss or damage arising from the defendant's breach was not caused by ordinary 'wear and tear' because: (a) according to the evidence of the plaintiff's experts, the defects were caused by the defendant's breach; (b) the parcel owners had complained to the defendant regarding the defects as early as September 2015; and (c) the nature of the defects could not have been caused by ordinary wear and tear but by the defendant's breach. Regarding contributory negligence, the defendant's amended defence did not plead that the plaintiff was guilty of contributory negligence. It was trite law that the defendant was bound by the amended defence. Lastly, the court opined that the partial rectification works did not constitute a novus actus interveniens which broke the chain of causation. Based on the above reasons, the court found as a fact that the plaintiff's damage was indeed caused by the defendant's breach (see paras 50–53).

(9) The evidence of the property manager was not material to the original action because he was not involved in any manner with the construction of the common property, as such, there was no suppression of material evidence by the plaintiff which would justify the court to draw adverse inference against the plaintiff. In any event, the defendant had a right to apply for a subpoena from the court to compel the property manager to testify in the present case, but this was not done by the defendant. Conversely, as regard the 'As-Built Drawings' and waterproofing warranty, these were material evidence in view of the nature of the water seepages and defects of the swimming and jacuzzi pools. Accordingly, the court was constrained to make an adverse inference pursuant to s 114(g) of the EA against the defendant for suppressing this material evidence (see paras 54–55).

(10) Premised on the above evidence and reasons, the court allowed the original action because the plaintiff had succeeded to discharged the legal and evidential burden under ss 101(1), (2) and 102 of the EA to prove on a balance of probabilities that the defendant was liable to the plaintiff for the defects of the common property based on the tort of negligence. The court also ordered costs in the sum of RM130,000 (subject to allocatur fee) to be paid by the defendant to the plaintiff but the third party shall contribute 25% of the said costs, ie, the sum of RM32,500 (see paras 56 & 76–77).

(11) The court awarded the compensatory damages to the plaintiff so as to put the plaintiff as the victim of a tort of negligence committed by the defendant, as nearly as possible, in the same position as the plaintiff would have been in if the tort had not been committed by the defendant.

The court ordered that the amounts of the compensatory damages shall be assessed by the learned judicial commissioner ('the JC') of the Shah Alam Construction Court and not by the court registrar. Further, the cost of the assessment of damages shall be determined by the JC and shall be paid by the defendant to the plaintiff. With regard to interest, the court exercised its discretionary power pursuant to s 11 of the Civil Law Act 1956 ('the CLA') and O 42 r 12 of the ROC to award interest at the rate of 5% per annum on the partial rectification cost from 10 March 2020 (date of filing of the statement of claim) until the date of full payment of such cost by the defendant to the plaintiff (see paras 59–63).

(12) The court was not able to award exemplary damages to the plaintiff due to the defendant's breach of the High Court's discovery order because: (a) any breach of a judgment or order of the court did not fall within the two categories mentioned in the case of Rookes v Barnard [1964] 1 All ER 367; (b) if there was non-compliance with the judgment or order of the court in favour of a party ('R'), R had every right to enforce or execute such judgment or order; and (c) the plaintiff's statement of claim did not pray for exemplary damages (see para 67).

(13) The third party shall indemnify the defendant in respect of any damage suffered by the plaintiff due to the defendant's non-compliance of the ER becuase: (a) the third party had breached its contractual obligation with the defendant to ensure that the electrical works complied with the ER; (b) the third party owed to the defendant under the tort of negligence a duty to take all reasonable care to ensure that the electrical works complied with the ER, and the third party had breached this duty of care; (c) the third party as the tortfeasor was liable to indemnify the defendant pursuant to s 10(1) and (2) of the CLA; (d) the third party's witness, TP1 had candidly admitted that he had no personal knowledge of the electrical works, but then again, the third party failed to call IR Yang who signed the drawings of the electrical works to testify, as such, the court drew adverse inference against the third party for suppressing material evidence; and (e) TP1 had frankly admitted during cross-examination that the third party should indemnify the defendant if the defendant was liable to the plaintiff in the original action in respect of the non-compliance of the ER (see para 71).

(14) **(Judicial suggestion/obiter dictum)** The court proposed for the Evidence Act 1950 and the Rules of Court 2012 to be amended to provide for the mandatory effect of O 40A r 3(1) and (2)(a) to (h) of the Rules of Court 2012 (see para 28).

[Bahasa Malaysia summary

Tindakan kecuaian semasa telah difailkan oleh badan pengurusan bersama ('JMB/plaintif') Subang Parkhomes ('kondominium') terhadap pemaju

kondominium tersebut ('pemaju/defendan') disebabkan oleh kecacatan dalam harta bersama kondominium tersebut ('kecacatan tersebut'). Plaintif memohon, antara lain, relif-relif berikut: (a) pengisytiharan bahawa defendan telah melanggar s 15(3) Akta Pengurusan Strata 2013 ('APS'); dan (b) perintah-perintah bahawa defendan hendaklah memperbaiki semua kecacatan tersebut dan membayar kepada plaintif kos untuk kerja-kerja pembaikan separa berhubung dengan kecacatan tersebut. Pemaju tersebut pula telah memfailkan tuntutan untuk indemniti pihak ketiga daripada jurutera perunding mekanikal dan elektrik yang telah dilantik oleh pemaju untuk pembinaan kondominium tersebut. Isu-isu yang timbul dalam tindakan ini ialah: (A) sama ada sesuatu pihak boleh mengemukakan pendapat pakar melalui pernyataan saksi dan bukan melalui afidavit menurut A 40A k 3(1) dan (2)(a) hingga (h) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') — isu ini juga melibatkan keberkaitan dan kebolehterimaan pernyataan saksi pakar di bawah ss 5, 7, dan 45(1) Akta Keterangan 1950 ('AK'); (B) sama ada defendan telah menyerahkan dokumen-dokumen yang berkaitan kepada plaintif seperti yang dikehendaki di bawah s 15(3) APS ('dokumen-dokumen tersebut') — isu ini berkaitan dengan perintah Mahkamah Tinggi terhadap defendan untuk penzahiran dokumen-dokumen mengenai penyenggaraan dan pengurusan kondominium tersebut ('perintah penzahiran Mahkamah Tinggi'); (C) sama ada defendan bertanggungjawab kepada plaintif untuk tort kecuaian — dalam menentukan isu ini, isu-isu sampingan yang timbul ialah: (1) sama ada defendan mempunyai kewajipan berjaga-jaga kepada plaintif; (2) sama ada kewujudan kecacatan kondominium tersebut dan puncanya boleh dibuktikan dengan keterangan pakar sahaja; (3) sama ada plaintif telah membuktikan kewujudan kecacatan harta bersama tersebut dan puncanya; (4) sama ada defendan telah melanggar undang-undang kecil 84(1), (4), (5) dan 115 Undang-undang Kecil Bangunan Seragam 1984 ('UUKBS') serta peraturan 36(1), 38(1) dan (3) Peraturan-Peraturan Elektrik 1994 ('PPE') ('peruntukan-peruntukan yang berkaitan'), dan jika ya, sama ada defendan juga bertanggungjawab terhadap plaintif bagi tort pelanggaran kewajipan berkanun; (5) sama ada defendan boleh bergantung pada sijil perakuan siap membaiki kecacatan ('CMGD') yang dikeluarkan oleh DW4 dan penamatan tempoh 'Defect Liability Period' sebagai pembelaan; (6) sama ada plaintif telah membuktikan, di atas imbangan kebarangkalian, kerugian atau kerosakan yang timbul daripada pelanggaran oleh defendan; (7) sama ada mahkamah perlu membuat inferens bertentangan di bawah s 114(g) AK, pertama, terhadap plaintif kerana tidak memanggil pengurus harta bagi kondominium tersebut, dan kedua, terhadap defendan kerana tidak mengemukakan 'As-Built Drawings' dan waranti sistem kalis air sebagai keterangan material pada perbicaraan; dan (8) sama ada plaintif boleh menuntut daripada defendan perkara-perkara berikut: (i) kos pembaikan separa; kos untuk memperbaiki kecacatan yang tidak dibaiki oleh defendan; apa-apa kerugian yang dialami oleh plaintif disebabkan oleh ketidakpatuhan defendan terhadap PPE; dan kehilangan akses, penggunaan dan kemudahan harta bersama plaintif

disebabkan oleh kecacatan tersebut (secara kolektif dirujuk sebagai 'ganti rugi pampasan'); dan (ii) ganti rugi teladan — berhubung dengan tuntutan ini, isu yang timbul ialah sama ada pelanggaran perintah penzahiran Mahkamah Tinggi oleh defendan boleh mewajarkan mahkamah mengenakan ganti rugi teladan ke atas defendan; dan (D) sama ada pihak ketiga bertanggungjawab untuk menanggung rugi berkenaan dengan liabiliti defendan kepada plaintif dalam kes ini.

Diputuskan:

(1) Berhubung dengan isu (A), mahkamah mendapati bahawa, pertama, undang-undang kes di negara ini telah memutuskan bahawa untuk membantu mahkamah memutuskan isu fakta dalam kes, s 45(1) AK membenarkan keterangan pakar dikemukakan. Kedua, pernyataan saksi DW4 dan pendapat pakar secara lisan adalah relevan dan boleh diterima di bawah ss 5 dan 7 AK. Ketiga, A 40A k 3(1) dan (2) KKM 2012 adalah tidak wajib. Tanpa mengira kebolehterimaan pernyataan saksi DW4 dan pendapat pakar secara lisan, serta sifat A 40A k 3(1) dan (2) KKM 2012 yang direktori, DW4 sepatutnya mengesahkan afidavit mengikut A 40A k 3(1) dan (2) KKM 2012, khususnya sub-perenggan (2)(h) (lihat perenggan 25–28).

(2) Dalam kes semasa, defendan tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa dokumen-dokumen seperti yang dikehendaki di bawah s 15(3) APS telah diserahkan kepada plaintif. Adalah jelas bahawa perintah penzahiran Mahkamah Tinggi tersebut adalah muktamad dan res judicata, namun defendan tetap gagal mematuhi perintah tersebut. Perlakuan sedemikian oleh defendan merupakan penghinaan terhadap perintah penzahiran tersebut. Berdasarkan keterangan-keterangan dan alasan-alasan di atas, mahkamah memberikan pengisytiharan bahawa defendan telah gagal menyerahkan kepada plaintif dokumen-dokumen seperti yang dikehendaki di bawah s 15(3) APS (lihat perenggan 30–31).

(3) Mahkamah mendapati bahawa defendan mempunyai kewajipan berjaga-jaga kepada plaintif walaupun pada hakikatnya plaintif masih belum ditubuhkan di bawah s 17(1) APS pada masa yang material. Ini adalah kerana terdapat kedekatan undang-undang yang mencukupi antara pihak-pihak berkenaan dengan harta bersama tersebut memandangkan boleh diramalkan secara munasabah bahawa jika defendan telah melanggar kewajipan berjaga-jaga, plaintif akan mengalami kehilangan dan kerugian. Selanjutnya, dasar awam juga sangat menyokong pengenaan kewajipan berjaga-jaga ke atas defendan. Hakikat bahawa tiada kontrak antara plaintif dan defendan adalah tidak material kerana tort kecuaian itu sendiri adalah kausa tindakan yang

bebas daripada ketiadaan apa-apa kontrak antara pihak-pihak (lihat perenggan 33–35). A

(4) Dalam apa-apa tuntutan untuk kecacatan dalam kerja pembinaan, tiada keperluan, sama ada dalam AK atau undang-undang kes Malaysia, bagi pihak yang menuntut untuk mengemukakan keterangan pakar di bawah s 45(1) AK. Walau bagaimanapun, pihak-pihak boleh mengemukakan pendapat pakar untuk membantu mahkamah berhubung kewujudan kecacatan kondominium dan punca-puncanya dan terpulang kepada mahkamah untuk memberikan nilai kepada pendapat pakar tersebut. Walau bagaimanapun, jika kewujudan dan punca kecacatan tersebut boleh dibuktikan dengan mudah oleh saksi bukan pakar dan jika sesuatu pihak ('Z') sewenang-wenangnya memanjangkan perbicaraan dan meningkatkan kos dengan memanggil saksi pakar, mahkamah mempunyai budi bicara untuk mengenakan kos berhubung dengan tindakan sedemikian oleh Z di bawah A 59 k 8(b) KKM 2012 (lihat perenggan 37–38). B C D

(5) Apa-apa pelanggaran peruntukan-peruntukan yang berkaitan tersebut dengan sendirinya tidak boleh menjadi asas untuk tuntutan tort pelanggaran kewajipan berkanun kerana pembinaan Akta Jalan, Parit dan Bangunan 1974 dan Akta Bekalan Elektrik 1990, Akta-Akta Parlimen yang memberi kuasa bagi UUKBS dan PPE, tidak menunjukkan niat Parlimen untuk memberikan hak tindakan peribadi kepada plaintif apabila defendan telah melanggar kewajipan yang dikenakan oleh peruntukan-peruntukan yang berkaitan tersebut (lihat perenggan 41). E F

(6) Mahkamah mendapati sebagai fakta bahawa plaintif telah berjaya melepaskan beban undang-undang dan keterangan untuk membuktikan kewujudan dan punca kecacatan tersebut di atas imbangan kebarangkalian dan seterusnya, mahkamah mendapati bahawa pelanggaran oleh defendan telah berlaku. Keterangan-keterangan dan alasan-alasan berikut menyokong keputusan fakta ini: (a) keterangan pakar daripada pakar-pakar plaintif, iaitu, PW6 dan PW7 dengan jelas membuktikan kewujudan kecacatan tersebut dan puncanya; (b) keterangan pakar daripada pakar-pakar defendan, iaitu, DW2, DW3 dan DW4, tidak dapat diterima oleh mahkamah kerana mereka tidak memeriksa harta bersama tersebut dan pepasangan elektrik tersebut; (c) defendan tidak menjawab atau menafikan surat-surat plaintif berkenaan kecacatan tersebut dan peninggalan ini adalah relevan di bawah s 8(2) AK; dan (d) walaupun tindakan asal tersebut telah difailkan terhadap defendan, defendan tidak memohon kepada plaintif untuk mendapatkan kebenaran untuk pakar-pakar defendan memeriksa kondominium tersebut untuk mengesahkan kewujudan dan punca kecacatan tersebut (lihat perenggan 43–45). G H I

(7) CMGD tersebut boleh menjadi keterangan tentang kerja pembaikan yang dilakukan defendan terhadap kecacatan kondominium tersebut tetapi memandangkan mahkamah telah mendapati sebagai fakta bahawa kecacatan tersebut wujud dan tidak diperbaiki oleh defendan, mahkamah berpendapat bahawa kandungan CMGD tersebut adalah tidak benar dan telah disangkal oleh keterangan pakar daripada PW6 dan PW7. Selanjutnya, mahkamah mendapati defendan tidak boleh bergantung kepada penamatan tempoh DLP sebagai pembelaan. Ini kerana tindakan asal adalah berdasarkan tort kecuaian. Berdasarkan s 6(1)(a) Akta Had Masa 1953, plaintif mempunyai hak berkanun selama enam tahun untuk memfailkan tindakan asal ini terhadap defendan berdasarkan tort kecuaian. Jika mahkamah menerima penamatan tempoh DLP tersebut sebagai pembelaan terhadap pelanggaran defendan, ini akan menyebabkan tempoh had masa enam tahun berkanun tersebut menjadi sia-sia (lihat perenggan 46–49).

(8) Mahkamah mendapati bahawa kehilangan atau kerugian yang timbul daripada pelanggaran defendan bukan disebabkan oleh 'wear and tear' biasa kerana: (a) mengikut keterangan pakar-pakar plaintif, kecacatan tersebut disebabkan oleh pelanggaran defendan; (b) pemilik-pemilik petak telah mengadu kepada defendan mengenai kecacatan tersebut seawal September 2015; dan (c) sifat kecacatan tersebut tidak mungkin disebabkan oleh 'wear and tear' biasa tetapi oleh pelanggaran defendan. Berkenaan kecuaian sumbangan, pembelaan terpinda defendan tidak memplid bahawa plaintif bersalah atas kecuaian sumbangan. Sudah menjadi undang-undang yang mantap bahawa defendan terikat dengan pembelaan terpinda tersebut. Akhir sekali, mahkamah berpendapat bahawa kerja-kerja pembaikan separa tersebut bukan merupakan novus actus interveniens yang memutuskan rantaian sebab musabab. Berdasarkan alasan-alasan di atas, mahkamah mendapati sebagai fakta bahawa kerugian plaintif sememangnya disebabkan oleh pelanggaran defendan (lihat perenggan 50–53).

(9) Keterangan pengurus harta tersebut adalah tidak material kepada tindakan asal kerana dia tidak terlibat dalam apa-apa cara sekali pun dengan pembinaan harta bersama tersebut, oleh itu, tiada sekatan keterangan material oleh plaintif yang akan mewajarkan mahkamah untuk membuat inferens bertentangan terhadap plaintif. Walaupun begitu, defendan mempunyai hak untuk memohon sepina daripada mahkamah untuk memaksa pengurus harta tersebut untuk memberi keterangan dalam kes ini, tetapi ini tidak dilakukan oleh defendan. Sebaliknya, berkenaan dengan 'As-Built Drawings' dan waranti sistem kalis air tersebut, ini merupakan keterangan material berdasarkan sifat resapan air dan kecacatan kolam renang dan jakuzi tersebut. Sehubungan itu, mahkamah perlu membuat inferens bertentangan menurut s 114(g)

AK terhadap defendan kerana menyekat keterangan material ini (lihat perenggan 54–55).

(10) Berdasarkan keterangan-keterangan dan alasan-alasan di atas, mahkamah membenarkan tindakan asal kerana plaintif telah berjaya melepaskan beban undang-undang dan keterangan di bawah ss 101(1), (2) dan 102 AK untuk membuktikan di atas imbangan kebarangkalian bahawa defendan bertanggungjawab kepada plaintif bagi kecacatan harta bersama tersebut berdasarkan tort kecuaian. Mahkamah juga memerintahkan kos berjumlah RM130,000 (tertakluk kepada fi alokatur) dibayar oleh defendan kepada plaintif tetapi pihak ketiga hendaklah menyumbang 25% daripada kos tersebut, iaitu jumlah sebanyak RM32,500 (lihat perenggan 56 & 76–77).

(11) Mahkamah telah memberikan award ganti rugi pampasan kepada plaintif bagi meletakkan plaintif, sebagai mangsa tort kecuaian yang dilakukan oleh defendan, sehampir mungkin, dalam kedudukan yang sama sebagaimana plaintif akan berada jika tort tersebut tidak dilakukan oleh defendan. Mahkamah memerintahkan bahawa jumlah ganti rugi pampasan hendaklah ditaksir oleh pesuruhjaya kehakiman Mahkamah Pembinaan Shah Alam yang bijaksana ('PK') dan bukan oleh pendaftar mahkamah. Selanjutnya, kos taksiran ganti rugi hendaklah ditentukan oleh PK dan hendaklah dibayar oleh defendan kepada plaintif. Berkenaan dengan faedah, mahkamah menggunakan kuasa budi bicaranya menurut s 11 Akta Undang-undang Sivil 1956 ('AUUS') dan A 42 k 12 KKM 2012 untuk membenarkan faedah pada kadar 5% setahun, ke atas kos pembaikan separa tersebut, dari 10 Mac 2020 (tarikh pemfailan pernyataan tuntutan) sehingga tarikh pembayaran penuh kos tersebut oleh defendan kepada plaintif (lihat perenggan 59–63).

(12) Mahkamah tidak dapat memberikan ganti rugi teladan kepada plaintif disebabkan oleh pelanggaran defendan terhadap perintah penzahiran Mahkamah Tinggi kerana: (a) apa-apa pelanggaran penghakiman atau perintah mahkamah tidak termasuk dalam dua kategori yang disebut dalam kes*Rookes v Barnard* [1964] 1 All ER 367; (b) jika terdapat ketidakpatuhan terhadap penghakiman atau perintah mahkamah yang memihak kepada sesuatu pihak ('R'), R berhak untuk menguatkuasakan atau melaksanakan penghakiman atau perintah tersebut; dan (c) pernyataan tuntutan plaintif tidak memohon ganti rugi teladan (lihat perenggan 67).

(13) Pihak ketiga hendaklah menanggung rugi defendan berkenaan dengan apa-apa kerugian yang dialami oleh plaintif disebabkan oleh ketidakpatuhan defendan terhadap PPE kerana: (a) pihak ketiga telah melanggar kewajipan kontraknya dengan defendan untuk memastikan bahawa kerja-kerja elektrik tersebut mematuhi PPE; (b) pihak ketiga mempunyai kewajipan kepada defendan di bawah tort kecuaian untuk

mengambil semua penjagaan yang munasabah untuk memastikan bahawa kerja-kerja elektrik tersebut mematuhi PPE, dan pihak ketiga telah melanggar kewajipan berjaga-jaga ini; (c) pihak ketiga sebagai 'tortfeasor' bertanggungjawab untuk menanggung rugi defendan menurut s 10(1) dan (2) AUUS; (d) saksi pihak ketiga, TP1 secara terang-terangan mengakui bahawa dia tidak mempunyai pengetahuan peribadi tentang kerja-kerja elektrik tersebut, namun begitu, pihak ketiga gagal memanggil IR Yang yang menandatangani lakaran kerja-kerja elektrik tersebut untuk memberi keterangan, oleh itu, mahkamah membuat inferens bertentangan terhadap pihak ketiga kerana menyekat keterangan material; dan (e) TP1 secara terus terang telah mengakui semasa pemeriksaan balas bahawa pihak ketiga harus menanggung rugi defendan jika defendan bertanggungjawab kepada plaintif dalam tindakan asal berkenaan dengan ketidakpatuhan PPE (lihat perenggan 71).

(14) **(Cadangan kehakiman/***obiter dictum***)** Mahkamah mencadangkan supaya Akta Keterangan 1950 dan Kaedah-Kaedah Mahkamah 2012 dipinda bagi memperuntukkan kesan mandatori A 40A k 3(1) dan (2)(a) hingga (h) Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 28).]

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ADM Ventures (M) Sdn Bhd & Ors v Renew Capital Sdn Bhd & Ors and other cases [2021] MLJU 1466, HC (refd)

Azman Karim & Anor v Hasa Arkitek Sdn Bhd & Ors [2024] 2 MLRH 322, HC (refd)

Chandrasekaran & Ors v Public Prosecutor [1971] 1 MLJ 153 (refd)

Chrishanthini Angela Regina a/p Sebastiampillai v View Esteem Sdn Bhd [2023] 1 MLJ 309; [2022] 1 LNS 2212, CA (refd)

Devan & Assoc (law firm wholly owned by Devan a/l Narayanan Raman) v TSR Bina Sdn Bhd [2015] 3 MLJ 454; [2015] 5 CLJ 17, CA (refd)

Dua Residency Management Corporation v Edisi Utama Sdn Bhd & Anor [2021] MLJU 140; [2021] 1 LNS 174, HC (refd)

Era Kemuncak Jaya (M) Sdn Bhd v Tenaga Switchgear Sdn Bhd [2021] MLJU 1855; [2022] 1 MLRH 208, HC (folld)

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Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal [2006] 1 MLJ 675, CA (refd)

Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor [2015] 4 MLJ 734; [2015] 7 CLJ 1008, FC (refd)

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Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd [2008] 2 MLJ 87; [2008] 2 CLJ 284, CA (refd)
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Sykt Faiza Sdn Bhd & Anor v Faiz Rice Sdn Bhd & Anor and another suit [2019] 7 MLJ 175, HC (refd)
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Legislation referred to

Civil Law Act 1956 ss 10(1), (2), 11
Electricity Regulations 1994 regs 36, 38, 110(4)
Electricity Supply Act 1990 s 23
Evidence Act 1950 ss 3, 5, 7, 8(2), 45(1), (2), 114(g)
Limitation Act 1953 s 6(1)(a)
Rules of Court 2012 O 40A r 3, O 40A r 3(1), (2)(a), (2) (h), O 42 r 12, O 59 rr 2(2), 8(b)
Strata Management Act 2013 ss 2, 7(2), 15(3), 17(1), 21(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e) (1)(f), (1)(g), (1)(h), (2)
Street, Drainage and Building Act 1974
Uniform Building By-laws 1984 by-laws 84(1), (4), (5), 115

Julian Chan Tjun Leung (with Stephanie Ang Jia Yee and Nur Izzati bt Mohd Shaiful Bahri) (Julian Stephanie) for the plaintiff.
Shamesh a/l Jeevaratnam (with Charlotte Diana Williams and Suzanne Maria Kuriane) (Jeeva Partnership) for the defendant.
T Thiya Eswaran (T Puvaneswaran and Suzanne Kuria) (Thiyages Pauline Ng & Co) for the third party.

Wong Kian Kheong JCA:

A. INTRODUCTION

[1] This judgment concerns:

(1) a suit by a 'Joint Management Body' ('JMB') of a 'development area' (defined in s 2 of the Strata Management Act 2013 ('the SMA')) known as 'Subang Parkhomes' ('condominium') against the developer of the condominium ('developer') for defects in the condominium's 'common property' ('defects'). The JMB's suit against the developer is based solely on the tort of negligence; and

(2) if the court finds the developer liable to the JMB for the defects ('developer's liability (JMB)'), the developer has claimed for a third party indemnity or contribution of the developer's liability (JMB) from the Mechanical and Electrical consultant engineers who had been appointed by the developer for the construction of the condominium ('M&E consultant').

B. BACKGROUND

[2] The defendant company ('defendant') was the developer of the condominium.

[3] On 25 June 2015, by virtue of s 17(1) of the SMA, the plaintiff, the condominium's JMB ('plaintiff'), was formed at the first Annual General Meeting of the JMB.

[4] AR Goh Day Ren (DW4) is a qualified and practising architect in 'Perkhidmatan Arkitek', the consultant architect for the construction of the condominium ('project consultant architect'). On 1 September 2015, the project consultant architect issued a 'Certificate of Making Good defects' to the defendant ('CMGD'). According to the CGMD (which was signed by DW4 on behalf of the project consultant architect):

(1) a joint inspection of the 'Common Area' of the condominium had been conducted by representatives of the defendant, Syarikat Pembinaan TPSB Sdn Bhd ('main contractor') and project consultant architect; and

(2) 'all defects at Common Area ... have been satisfactorily made good'.

[5] Some of the owners of the parcels in the condominium ('parcel owners') who called themselves 'Parkhomes Core Working Group', had sent a list of defects to the defendant. In a letter dated 3 September 2015 ('defendant's letter (3 September 2015)'), the defendant stated as follows, among others:

(1) certain defects in the condominium had been 'rectified, inspected and duly certified by' the defendant's architect; and

(2) all the defects listed by the Parkhomes Core Working Group, were features of the condominium's 'overall design' and were 'not considered' by the defendant to be defects.

[6] The plaintiff discovered the following defects in the common property of the condominium ('defects (common property)'):

(1) water leakages in the penthouse rooftops and basement carpark; and

(2) displacement of tiles in the swimming and jacuzzi pools ('defects (swimming/jacuzzi pools)').

[7] By way of a letter dated 25 January 2017, the plaintiff appointed Architect Centre Sdn Bhd ('Architect Centre') to, among others, inspect the condominium and prepare a 'Property Inspection and Advisory Report' ('PIRA').

[8] With regard to the PIRA dated 29 May 2017:

(1) the PIRA was prepared by, among others:

(a) AR Anthony Lee Tee (PW6), a qualified and practising architect who is the Managing Director (MD) of Architect Centre; and

(b) IR Kok Yen Kwan (PW7), a qualified and practising electrical engineer who is attached to NK Engineering Sdn Bhd.

(2) PW6 carried out an inspection of the condominium on 14 March 2017 and 15 March 2017;

(3) PW7 inspected the electrical installations and electrical services in the condominium ('electrical installations/services') on 14 March 2017;

(4) PW6 reported as follows, among others:

(a) there were water seepages:

(i) from the roof of the condominium through the 'RC' (Reinforced Concrete) Slab, Gutters and Upstand Parapet Walls into the Penthouses of the condominium; and

(ii) from the 'Landscape Podium', through the RC Slab, Gutters into the basement car park of the condominium ('water seepages');

(b) the water seepages were caused by a lack of waterproofing in the condominium. Hence, there was stagnant rainwater ponding on the RC flat slabs and RC gutters; and

(c) in view of the water seepages, there was non-compliance with by-laws 84(1), (4), (5) and 115 of the Uniform Building By-laws 1984 ('the UBBL'); and

(5) PW7 reported that, among others:

(a) the electrical installations/services did not comply with, among others, regs 36 and 38 of the Electricity Regulations 1994 ('the ER') ('non-compliance (ER)'); and

(b) the non-compliance (ER) should be rectified on an urgent basis because it is 'highly dangerous'.

[9] On 6 April 2018, the plaintiff sent a letter to the defendant for the latter to rectify the defects (swimming/jacuzzi pools) ('plaintiff's letter (6 April 2018)'). Attached to the plaintiff's letter (6 April 2018) were photographs of the defects (swimming/jacuzzi pools). The defendant did not reply to the plaintiff's letter (6 April 2018).

[10] The plaintiff sent a letter dated 18 June 2018 for the defendant to remedy the defects (swimming/jacuzzi pools) ('plaintiff's letter (18 June 2018)'). Once again, there was no reply by the defendant to the plaintiff's letter (18 June 2018).

[11] On 25 June 2018, the plaintiff sent a letter to the defendant to rectify the cracks on the stone plaster boxes which were integrated with the condominium's swimming pool ('plaintiff's letter (25 June 2018)'). The plaintiff's letter (25 June 2018):

(1) requested for the defendant to supply a copy of 'building drawings' to the plaintiff; and

(2) was not answered by the defendant.

[12] The plaintiff's solicitors issued a letter dated 28 June 2018 to the defendant ('plaintiff's demand (28 June 2018)'). With regard to the plaintiff's demand (28 June 2018):

(1) the plaintiff demanded the defendant to, among others:

(a) rectify the water seepages; and

(b) comply with:

(i) s 23 of the Electricity Supply Act 1990 ('the ESA'); and

(ii) regs 36 and 110(4) of the ER.

(2) the plaintiff requested the defendant to provide the waterproofing warranty, as-built drawings, architectural plans, Sections and Elevations and documents stated in the PIRA. A copy of the PIRA was attached to the plaintiff's demand (28 June 2018); and

(3) the defendant did not reply to, let alone deny, the plaintiff's demand (28 June 2018).

[13] As the defendant did not remedy the defects (common property), on an urgent basis, the plaintiff appointed the following three contractors to carry out certain rectification works of some of the defects (common property) ('partial rectification works'):

(1) as a result of the water leakages in the condominium, LCK Construction ('LCK') was appointed by the plaintiff to carry out plastering and coating works ('LCK's rectification works'). The plaintiff paid a sum of RM5,010 for LCK's rectification works;

(2) the plaintiff appointed Krishire Sdn Bhd ('Krishire') to remedy the water leakages in the condominium by, among others, providing waterproofing in the condominium ('Krishire's rectification works'). Krishire's rectification works cost the plaintiff a total sum of RM294,007.14; and

(3) Muzia Art & Design ('Muzia') was appointed by the plaintiff to rectify the water seepages ('Muzia's rectification works'). A total sum of RM140,400 was paid by the plaintiff for Muzia's rectification works.

C. THE PLAINTIFF'S PRE-ACTION DISCOVERY APPLICATION

[14] In addition to the plaintiff's letter (25 June 2018) and the plaintiff's demand (28 June 2018) which requested for the defendant to supply to the plaintiff the documents regarding the maintenance and management of the condominium ('documents (condominium)'), the plaintiff's solicitors sent a letter dated 13 August 2018 to the defendant ('plaintiff's demand (13 August 2018)') which demanded that, among others, if the defendant did not supply the documents (condominium) within seven days, the plaintiff would apply to the High Court for a pre-action discovery order against the defendant.

[15] The defendant did not respond to the plaintiff's demand (28 June 2018). Hence, the plaintiff filed Originating Summons No BA-24NCvC-1123–09 of 2018 against the defendant in the Shah Alam High Court for an order to compel the defendant to hand over the documents (condominium) to the plaintiff ('plaintiff's pre-action discovery OS').

[16] The High Court was scheduled to deliver the decision of the plaintiff's pre-action discovery OS on 7 May 2019 ('High Court's decision (plaintiff's pre-action discovery OS)'). On 6 May 2029, a day before the High Court's decision (plaintiff's pre-action discovery OS), the defendant's solicitors sent a letter to the plaintiff's solicitors and handed some (but not all) of the documents (condominium).

[17] On 7 May 2019, the High Court allowed the plaintiff's pre-action discovery OS and ordered, among others, certain documents (condominium)

to be handed by the defendant to the plaintiff ('High Court's discovery order').

[18] By way of a letter dated 19 July 2019, the defendant's solicitors sent some of the documents (condominium) to the plaintiff's solicitors but the defendant still failed to comply fully with the High Court's discovery order. Consequently, the plaintiff's solicitors sent a demand dated 3 September 2019 to the defendant's solicitors ('plaintiff's demand (3 September 2019)') which stated, among others, as follows:

(1) the plaintiff's solicitors had specified certain documents (condominium) which had not been handed by the defendant to the plaintiff; and

(2) if the documents (condominium) were not handed by the defendant to the plaintiff within three working days from the plaintiff's demand (3 September 2019), the plaintiff would file a suit against the defendant.

The defendant did not reply to the plaintiff's demand (3 September 2019).

D. LEGAL PROCEEDINGS IN THIS CASE

[19] On 10 March 2020, the plaintiff filed this suit against the defendant (original action) and the statement of claim ('SOC') prayed for, among others, the following relief against the defendant:

(1) a declaration that the defendant had breached s 15(3) of the SMA; and

(2) the following orders:

(a) the defendant shall rectify all the defects (common property); and

(b) the defendant shall pay the plaintiff the Partial Rectification Cost.

With regard to the defects (common property), the plaintiff's sole cause of action against the defendant in the original action was the tort of negligence.

[20] The defendant resisted the original action and obtained leave of this court to institute third party proceedings ('third party proceedings') against the above third party company ('third party')

[21] By consent of all parties, the original action and third party proceedings were tried together ('trial').

[22] The following witnesses testified at the trial:

(1) seven witnesses gave evidence for the plaintiff, namely:

(a) Encik Khairil Faizal bin Othman (PW1), the chairman of the plaintiff (JMB) for 2018;

(b) Encik Jofi Ariff bin Ghazali (PW2), the chairman of the plaintiff for 2019;

(c) Mr David Yep Chee Fai (PW3), a director of LCK;

(d) Mr Justin Wong Soon Cheong (PW4), Krishire's director;

(e) Mr Vincent Wong Ghee Wu (PW5), a director of Muzia;

(f) PW6; and

(g) PW7;

(2) three witnesses gave testimonies in favour of the defendant, ie:

(a) Ms Lim Puay Fong (DW1), a director of the defendant;

(b) AR Ho Peng Keat (DW2), a qualified and practising architect in 'DMP Architects';

(c) IR Chong Yee Fatt (DW3), an electrical engineer attached to KVA Consult (M) Sdn Bhd; and

(d) the defendant applied to this court and obtained a subpoena to compel DW4 to give an expert opinion in this case. DW4 gave a witness statement (not an affidavit) in this case. I will express my view in Part F below regarding DW4's witness statement with a plea for law reform; and

(3) IR How Kok Pong (TP1), a professional engineer and TP's MD, was the only witness for the third party.

E. ISSUES

[23] The following questions arise in this case:

(1) whether a party can tender an expert opinion by way of a witness statement and not by an affidavit pursuant to O 40A r 3(1) and (2)(a) to (h) of the Rules of Court 2012 ('the RC'). This issue also concerns the relevancy and admissibility of DW4's witness statement under ss 5, 7 and 45(1) of the Evidence Act 1950 ('the EA');

(2) did the defendant deliver to the plaintiff the documents as stipulated in s 15(3) of the SMA?

(3) with regard to the tort of negligence, whether the defendant owed a duty of care to the plaintiff to construct the common property of the condominium (common property) in a good and workmanlike manner (duty of care). in this

regard, can the defendant rely on the following defences to negate the existence of the duty of care:

(a) the plaintiff was not established under s 17(1) of the SMA when:

(i) the defendant entered into sale and purchase agreements ('SPAs') and deeds of mutual covenants ('DMCs') with the parcel owners;

(ii) the defendant completed the construction of the condominium;

(iii) the defendant delivered vacant possession of the parcels in the condominium ('parcels') to the parcel owners; and

(iv) the defendant maintained and managed the common property during the 'developer's management period' under s 7(2) read with s 9(1) of the SMA; and/or

(b) there was no contract between the plaintiff and defendant regarding the condominium, let alone the common property.

(4) if the duty of care existed:

(a) had the plaintiff discharged the legal and evidential burden to prove the defects (common property) on a balance of probabilities? Can the plaintiff discharge this legal and evidential burden by way of expert evidence only?

(b) did the defendant breach the duty of care? Related to this question are the following issues:

(i) had the defendant breached by-laws 84(1), (4), (5) and 115 UBBL as well as regs 36(1), 38(1) and (3) of the ER ('relevant provisions (UBBL/ER)')? If the defendant had breached the relevant provisions (UBBL/ER), was the defendant additionally liable to the plaintiff for the tort of breach(es) of the relevant provisions (UBBL/ER)?

(ii) can the defendant rely on the CMGD issued by the project consultant architect (signed by DW4) to assert that the defects (condominium) had been rectified and as such, the defendant had not breached the duty of care? and

(iii) whether the defendant can deny a breach of the duty of care on the ground that the 'Defect Liability Period' as stipulated in the SPAs ('DLP') had expired.

(c) if the defendant had breached the duty of care ('defendant's breach'), whether the plaintiff had proven on a balance of probabilities loss or damage arising from the defendant's breach ('plaintiff's damage') which was not caused by:

(i) ordinary 'wear and tear' ('defence (wear and tear)');

(ii) the plaintiff's contributory negligence in failing to take reasonable care to maintain and manage the common property ('defence (plaintiff's maintenance failure)'); and

(iii) a 'novus actus interveniens' (an intervening act which broke the chain of causation between the defendant's breach and the plaintiff's damage) in the form of the partial rectification works. In this regard, did the plaintiff mitigate the plaintiff's damage by undertaking the partial rectification works?

(d) should the court draw an adverse inference under s 114(g) of the EA against:

(i) the plaintiff for not calling an employee of JL Facilities Management Sdn Bhd (property manager) (who was managing the common property for the plaintiff at the material time) to testify at the trial? and

(ii) the defendant for not adducing the 'As-Built Drawings' and waterproofing warranty as material evidence at the trial; and

(e) whether the plaintiff could claim from the defendant as follows:

(i) the partial rectification cost;

(ii) the cost for the plaintiff to rectify all the defects (common property) which had not been rectified and/or made good by the defendant ('balance (rectification cost)');

(iii) any damage which may be suffered by the plaintiff as a result of the defendant's non-compliance of the ER ('defendant's liability (ER)');

(iv) the plaintiff's loss of access, use and amenity of the common property due to the defects (common property) ('defendant's liability (plaintiff's loss of access/use/amenity)'); and

(v) exemplary or punitive damages. In this regard, whether the defendant's breach of the High Court's discovery order can justify the court's imposition of exemplary damages on the defendant? and

(5) whether the third party is liable to indemnify or contribute with regard to the defendant's liability to the plaintiff in this case.

The above sub-paras (1), (3), (4)(b)(ii), (c)(iii) and (e)(iii) to (v) raise novel legal issues.

A F. SHOULD SD4 AFFIRM AN AFFIDAVIT IN ACCORDANCE WITH O 40A R 3 RC?

[24] We reproduce below ss 5, 7 and 45 EA as well as O 40A r 3 of the RC:

B EA

s 5 Evidence may be given of facts in issue and relevant facts

Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

C

s . Facts which are the occasion, cause or effect of facts in issue

Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity of their occurrence or transaction, are relevant.

D

s 45 Opinions of expert

(1) *When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.*

E

(2) *Such persons are called experts.*

RC

F

O 40A r 3 Requirements of expert's evidence

(1) *Unless the Court otherwise directs, expert evidence to be given at the trial of any action, is to be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him testifying that the report exhibited is his and that he accepts full responsibility for the report.*

G

(2) An expert's report shall —

(a) give details of the expert's qualifications;

(b) give details of any literature or other material which the expert witness has relied on in making the report;

H

(c) contain a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given;

(d) if applicable, state the name and qualifications of the person who carried out any test or experiment which the expert has used for the report and whether or not such test or experiment has been carried out under the expert's supervision;

I

(e) where there is a range of opinion on the matters dealt with in the report —

(i) summarise the range of opinion; and

(ii) *give reasons for his opinion;*

(f) contain a summary of the conclusions reached;

(g) contain a statement of belief of correctness of the expert's opinion; and

(h) *contain a statement that the expert understands that in giving his report, his overriding duty is to the Court and that he complies with that duty.* (Emphasis added.)

[25] Firstly, s 45(1) of the EA applies to 'an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions'. However, our case law has decided that to assist the court to decide a factual issue in a case, s 45(1) of the EA allows expert evidence to be tendered even though the expert opinion is not 'a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions'. In the High Court case of *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153, at pp 159–160, Raja Azlan Shah J (as his Majesty then was) admitted an expert opinion regarding typescripts pursuant to s 45 of the EA even though s 45 of the EA is silent on typescripts.

[26] Secondly, SD4's witness statement and oral expert opinion were relevant and admissible in this case because:

(1) a 'fact in issue' is defined in s 3 of the EA as 'any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows'. The existence of the defects (condominium) and their causes ('existence/cause (defects)') were 'facts in issue' in the original action and third party proceedings within the meaning of s 3 of the EA. Consequently, SD4's witness statement and oral expert testimony concerned could be adduced as evidence in this case pursuant to s 5 of the EA; *or*

(2) as SD4's witness statement and oral expert opinion (fell within s 45(1) of the EA) concerned the existence/cause (defects), such evidence was relevant:

(a) under s 7 of the EA (Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity of their occurrence or transaction); and

(b) as understood in s 3 of the EA, namely 'one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the [EA] relating to the relevancy of facts'.

In view of the above reasons, SD4's witness statement and oral expert opinion were relevant and admissible under ss 5 and 7 of the EA.

[27] Thirdly, O 40A r 3(1) and (2) of the RC are not mandatory provisions. This is clear from the following trilogy of High Court decisions:

(1) in *ADM Ventures (M) Sdn Bhd & Ors v Renew Capital Sdn Bhd & Ors and other cases* [2021] MLJU 1466, at [88], Lau Bee Lan J (as she then was) delivered the following judgment:

> [88]*By virtue of the opening words 'unless the Court otherwise directs …' being present in O 40A r 3(1) [RC], I am of the respectful view that is not mandatory for the written report of the expert to be exhibited in an affidavit form sworn or affirmed by him. Consequentially premised on the authority of Datuk Captain Hamzah (supra), since the non-compliance is not mandatory in nature, in the interest of justice I invoke O 1A [RC] to overcome the technical non-compliance.* (Emphasis added.)

(2) *ADM Ventures* had been followed in:

(a) by John Lee Kien How @ Mohd Johan Lee JC (as he then was) in *Mercu Pusu Development Sdn Bhd v Setara Jaya Sdn Bhd* [2022] MLJU 512, at [52] and [53]; and

(b) *Ooi Cheng Huat @ Ooi Peng Huat (suing in his own name and as the executor and trustee of the estate of Linda Patricia Lim Sooi Hong, deceased) & Ors v Sime Darby Property Bhd and other cases* [2024] MLJU 83, at [49].

[28] Notwithstanding:

(1) the admissibility of SD4's witness statement and oral expert opinion in this case, and

(2) the directory nature of O 40A r 3(1) and (2) RC,

– SD4 should have affirmed an affidavit in accordance with O 40A r 3(1) and (2) RC, in particular sub-paragraph (2)(h) RC (where SD4's affidavit should contain a statement that he 'understands that in giving his report, his overriding duty is to the Court and that he complies with that duty'). In this regard, I respectfully propose for the EA and RC to be amended to provide for the mandatory effect of O 40A r 3(1) and (2)(a) to (h) of the RC.

G. WHETHER DEFENDANT HAD DELIVERED DOCUMENTS TO PLAINTIFF AS REQUIRED BY S 15(3) OF THE SMA?

[29] The relevant parts of s 15(1) and (3) of the SMA state as follows:

s 15 Handing over by developer to the [JMB]

(1) *A developer shall, before the developer's management period expires —*

...

(b) *hand over to the [JMB] —*

...

(iv) *all records relating to and necessary for the maintenance and management of the buildings* or lands intended for subdivision into parcels *and the common property of the development area*; ...

...

(3) *Without prejudice to the generality of subparagraph (1)(b)(iv), the developer shall deliver to the [JMB] copies of all of the following documents:*

(a) *all approved plans for buildings or lands intended for subdivision into parcels relating to the development area;*

(b) *any document in the developer's possession that indicates, as far as practicable, the actual location of any pipe, wire, cable, chute, duct or other facility for the passage or provision of systems or services, if the developer has reason to believe that the pipe, wire, cable, chute, duct or other facility is not located as shown on an approved plan or an approved amended plan;*

(c) *all contracts entered into by the developer in respect of the maintenance or management of any building* or land intended for subdivision into parcels *and the common property comprised in the development area*;

(d) a copy of the schedule of parcels or the amended schedule of parcels filed with the Commissioner under subsection 6(1) or (2), if applicable, or a copy of the proposed strata plan filed with the Director under the provisions of the Strata Titles Act 1985, if any;

(e) t*he names and addresses of such contractors, subcontractors and persons who supplied labour or materials to the development area during the construction of any building* or land intended for subdivision into parcels *and the common property comprised in the development area*;

(f) *all warranties, manuals, schematic drawings, operating instructions, service guides, manufacturer's documentation and other similar information in respect of the construction, installation, operation, maintenance, repair and servicing of any common property, including any warranty or information provided to the developer by any person referred to in paragraph (e);*

(g) the register of all parcel owners of the buildings or lands intended for subdivision into parcels; and

(h) the original copy of all insurance policies effected under [SMA]. (Emphasis added.)

[30] I have no hesitation to grant a declaration that the defendant had failed to deliver to the plaintiff the following documents as required in s 15(3) of

A the SMA:

(1) the operating manual of the common property;

(2) the 'Handicapped Access *Plans*' which were submitted by the defendant to the Local Authority;

B

(3) the draft Strata Title Plan was submitted by the defendant to the Land Office in the defendant's application for strata titles;

(4) the final and/or amended approved building plans;

C (5) 'Schematic Drawings';

(6) 'As-Built Drawings';

(7) a copy of the extended warranty documents for the roof system, including the frame and roof covering, gutter, RWDP (RAINWATER

D DOWNPIPe, a pipe that directs rainwater away from a building and into the drainage system) and their accessories;

(8) a copy of the waterproofing systems for RC flat roof, swimming pool, water retention structure, tanks and planter boxes;

E (9) approved structural plans for the swimming pool, spa pool and wading pool, including the structural plans for the planter boxes connected to the pools; and

(10) approved structural plans for the planting area water feature and cafeteria

F water feature,

('documents (s 15(3) of the SMA)').

[31] The decision in the above para 30 is premised on the following evidence and reasons:

G

(1) the plaintiff had obtained the High Court's discovery order. The defendant did not appeal to the Court of Appeal against the High Court's discovery order. It is thus clear that the High Court's discovery order is final and *res judicata*;

H

(2) the plaintiff's demand (3 September 2019) had been sent for the defendant to comply with the High Court's discovery order. Yet, the defendant did not reply to, let alone comply with, the High Court's discovery order. Such conduct by the defendant constituted a contempt of the High Court's discovery order ('defendant's breach (High Court's

I discovery order)'); and

(3) the defendant did not adduce any evidence to show that the documents (s 15(3) of the SMA) had been handed to the plaintiff.

It is to be noted that the defendant's breach (High Court's discovery order)

had made it difficult for the plaintiff to maintain and manage the common property.

H. WHETHER DEFENDANT WAS LIABLE TO PLAINTIFF FOR TORT OF NEGLIGENCE

H(1). Did defendant owe duty of care to plaintiff?

[32] In deciding whether a party (X) owes a duty of care to another party (Y) with regard to the tort of negligence, according to the Federal Court's judgment delivered by Zainun Ali FCJ in *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734; [2015] 7 CLJ 1008, at [68], the court will consider the following two questions:

(1) whether there is 'sufficient legal proximity' between X and Y. In deciding the existence of sufficient legal proximity between X and Y, the court will apply the test of whether it is reasonably foreseeable that Y will suffer loss or damage arising from X's conduct; and

(2) if there is sufficient legal proximity between X and Y, X owes a prima facie duty of care to Y. The second question which arises is whether X's prima facie duty of care is negated by policy consideration.

[33] I am of the view that the defendant owed the duty of care to the plaintiff. My reasons are as follows:

(1) there was sufficient legal proximity between the defendant and plaintiff with regard to the common property because it was reasonably foreseeable that if the defendant had breached the duty of care, the plaintiff would have suffered loss and damage ('sufficient legal proximity (defendant/plaintiff)');

(2) when the defendant applied for the necessary approvals to build the condominium, the defendant knew as a fact that the plaintiff (JMB) would be subsequently established pursuant to s 17(1) of the SMA to take over the maintenance and management of the common property from the defendant. This is clear from the ss 7(2) and 9(1) of the SMA which read as follows:

> s 7(2) *In this Part, 'developer's management period' means the period commencing from the date of delivery of vacant possession of a parcel to a purchaser by the developer until one month after the establishment of the [JMB]* or such other time as may be extended by the Commissioner.

> s 7(2) *In this Part, 'developer's management period' means the period commencing from the date of delivery of vacant possession of a parcel to a purchaser by the developer until one month after the establishment of the [JMB]* or such other time as may be extended by the Commissioner.

A s 7(2) *In this Part, 'developer's management period' means the period commencing from the date of delivery of vacant possession of a parcel to a purchaser by the developer until one month after the establishment of the [JMB]* or such other time as may be extended by the Commissioner.

B s 9(1) *Subject to the provisions of this Act, a developer shall, during the developer's management period, be responsible to maintain and manage properly any building* or land intended for subdivision into parcels *and the common property.* (Emphasis added.)

C (3) Parliament has conferred '*duties*' and '*powers*' on the JMB to maintain and manage the common property under s 21(1)(a), (b), (e), (i) and (2)(c) to (h) of the SMA. Reproduced below is the relevant part of s 21(1) and (2) of the SMA:

s 21. Duties and powers of [JMB]

D (1) *The duties of [JMB] shall be as follows:*

(a) *to properly maintain and manage* the building or land intended for subdivision into parcels and *the common property, and keep it in a state of good and serviceable repair*;

E (b) *to determine and impose the Charges to be deposited into the maintenance account for the purpose of the proper maintenance and management of* the buildings or lands intended for subdivision into parcels and *the common property*;

...

F (e) *to comply with any notice or order given or made by the local authority or any competent public authority requiring the abatement of any nuisance on the common property, or ordering repairs or other work to be done in respect of the common property or other improvements to the common property*;

G ...

(i) *to do such other things as may be expedient or necessary for the proper maintenance and management of* the buildings or lands intended for subdivision into parcels and *the common property.*

H (2) T*he powers of the [JMB] shall be as follows*:

...

(c) t*o authorize expenditure for the carrying out of the maintenance and management of* the buildings or lands intended for subdivision into parcels and t*he common property*;

I ...

(d) to recover from any parcel owner any sum expended by the [JMB] in respect of that parcel in complying with any such notice or order as referred to in paragraph (1)(e);

(e) to purchase, hire or otherwise acquire movable property for use by the parcel owners in connection with their enjoyment of the common property;

(f) to employ or arrange and secure the services of any person or agent to undertake the maintenance and management of the common property of the building or lands intended for subdivision into parcels;

(g) subject to subsection 32(3), to make additional by-laws for the proper maintenance and management of the buildings or lands intended for subdivision into parcels and the common property; and

(h) to do all things reasonably necessary for the performance of its duties under this Act and for the enforcement of the by-laws.

(4) as there was sufficient legal proximity (defendant/plaintiff), the defendant owed a *prima facie* duty of care to the plaintiff. The defendant's *prima facie* duty of care to the plaintiff was not negated by any policy consideration. On the contrary, policy considerations strongly support the imposition of the duty of care on the defendant. If otherwise, a JMB's duties and powers to maintain and manage the common property as conferred by s 21(1)(a), (b), (e), (i) and (2)(c) to (h) of the SMA will be rendered nugatory; and

(5) in the High Court case of *Dua Residency Management Corporation v Edisi Utama Sdn Bhd & Anor* [2021] MLJU 140; [2021] 1 LNS 174, at [111] (*Dua Residency MC*), Lim Chong Fong J (as he then was) had decided that a developer of a condominium owed a duty of care to the management corporation ('MC') of the condominium to ensure that the condominium had been properly constructed with good workmanship in accordance with the SPAs. If a developer owes a duty of care to a MC of a development area (as decided in *Dua Residency MC*), there is no reason, either in principle or policy, why a developer cannot owe the same duty of care to a JMB of the same development area.

[34] Once there was sufficient legal proximity (defendant/plaintiff), the defendant owed the duty of care to the plaintiff notwithstanding the fact that the plaintiff was not established under s 17(1) of the SMA when:

(1) the defendant entered into SPAs and DMCs with the parcel owners;

(2) the defendant completed the construction of the condominium;

(3) the defendant delivered vacant possession of the parcels in the condominium to the parcel owners; and

(4) the defendant maintained and managed the common property during the 'developer's management period' under s 7(2) read with s 9(1) of the SMA.

[35] The fact that there was no contract between the plaintiff and defendant

regarding the condominium or the common property, is immaterial. This is because the tort of negligence in itself is a cause of action which is independent of the non-existence of any contract between the plaintiff and defendant.

H(2). Could existence/cause (defects) be proven by expert evidence only?

[36] In this case, both the plaintiff and defendant had adduced expert testimonies from architects and electrical engineers regarding the existence/cause (defects).

[37] I must state that in any claim for defects in construction works, there is no requirement, either in the EA or Malaysian case law, for the claimant to adduce expert evidence under s 45(1) of the EA. In this regard, I rely on the following judgment in *Era Kemuncak Jaya (M) Sdn Bhd v Tenaga Switchgear Sdn Bhd* [2021] MLJU 1855; [2022] 1 MLRH 208, at [37] (a construction contract claim):

> [37] *Secondly, I am of the view that the court can decide the following three questions (three questions) in this case without the assistance of any expert testimony*:
>
> (1) *the issue (breach of contract);*
>
> (2) *the issue (remoteness of damage) under s 74(1) CA; and*
>
> (3) *the issue (quantum of Damages).*
>
> *I acknowledge that there may be exceptional cases when the three questions involve a highly technical matter which is beyond the competence of the court. In such exceptional matters, an expert's opinion may assist the court to decide the three questions. In this case, the three questions did not concern any highly technical matter which necessitated the defendant to adduce any expert view. Regrettably, SD5's Opinion on thethree questions unnecessarily protracted the trial and escalated the costs incurred in this case.* (Emphasis added.)

[38] Needless to say, parties may adduce expert opinions to assist the court regarding the existence/cause (defects) and it is up to the court to attach any weight to the expert evidence. Having said that, if the existence/cause (defects) can be easily proven by non-expert witnesses and if a party (Z) unnecessarily prolongs a trial and escalates costs by calling expert witness(es), the court has a discretion to impose costs with regard to such a conduct by Z under O 59 r 8(b) of the RC. Order 59 r 8(b) of the RC states as follows:

> *O 59 r 8 Special matters to be taken into account in exercising discretion*
>
> *The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account —*
>
> ...
>
> *(b) the conduct of all the parties, including conduct before and during the proceedings;* (Emphasis added.)

H(3). Effect of relevant provisions (UBBL/ER)

[39] Reproduced below are the relevant provisions (UBBL/ER):

UBBL

by-law 84. Prevention of dampness.

(1) Suitable measures shall be taken to prevent the penetration of dampness and moisture into a building.

...

(4) *Where any part of a floor of the lowest or only storey of a building is below the surface of the adjoining ground and a wall or part of a wall of the storey is in contact with the ground —*

(a) *the wall or part of the wall shall be constructed or provided with a vertical damp proof course so as to be impervious to moisture from its base to a height of not less than 150 millimetres above the surface of the ground; and*

(b) *an additional damp proof course shall be inserted in the wall or part of the wall at its base.*

(5) Where the floor or any part of the walls of a building is subject to water pressure, that portion of the floor or wall below ground level shall be waterproof.

by-law 115. Roof coverings and drainage

All roofs of buildings shall be so constructed as to drain effectually to suitable and sufficient channels, gutters, chutes or troughs which shall be provided in accordance with the requirements of these By-Laws for receiving and conveying all water which may fall on and from the roof.

ER

reg 36. Protection against earth leakage current.

(1) For an installation in a place of public entertainment, protection against earth leakage current shall be afforded for any final circuit supplying electricity to an equipment which is intended to provide service to the public or which is intended to be accessible to, used by or operated by the public by a residual current device having a rated residual operating current not exceeding 10 milliamperes.

(2) For an installation in a place where the floor is likely to be wet or where the wall or enclosure is of low electrical resistance, protection against earth leakage current shall be afforded for any final circuit supplying electricity to any equipment, either individually or in a group, by a residual current device having a rated residual operating current not exceeding 10 milliamperes.

(3) For an installation where hand-held equipment, apparatus or appliance is used or is likely to be used, protection against earth leakage current shall be afforded for any final circuit, either individually or in a group, by a residual current device having a rated residual operating current not exceeding 30 milliamperes.

(4) For an installation, other than the installations mentioned in subregulations (1), (2) and (3), protection against earth leakage current shall be afforded for any final

circuit, either individually or in a group, by a residual current device having a rated residual operating current not exceeding 100 milliamperes unless —

(a) for functional reasons, it is impractical to provide the protection; or

(b) it is unsafe or even dangerous to provide the protection.

reg 38 *Notice.*

(1) A standard notice displaying the words 'DILARANG MASUK' shall be placed outside a place containing electrical equipment where unauthorized interference with the equipment is to be expected and where such interference is dangerous.

(2) The notice referred to in subregulation (1) shall be of suitable material, 350 millimetres wide and 240 millimetres high with the lettering in black on a white background, and the words 'DILARANG MASUK' shall be inscribed in capital letters in the middle, the inscription being 290 millimetres long and 30 millimetres high and the spacing of letters being 6 millimetres wide.

(3) A standard notice displaying the word 'BAHAYA' shall be placed in a conspicuous position near the switchboard.

(4) *The notice referred to in subregulation (3) shall be of suitable material, 240 millimetres wide and 350 millimetres high with the lettering in red on a white background, and at the top it shall bear a line of three conventional thunderbolts each 80 millimetres high and 6 millimetres wide at the broadest part, and below these the word 'BAHAYA' shall be inscribed in capital letters, the inscription being 190 millimetres long and 28 millimetres high and the spacing of letters being 6 millimetres wide.*

(5) The notices under subregulations (1) and (3) shall be legible and placed in conspicuous positions. (Emphasis added.)

[40] It is to be noted that the mandatory term 'shall' is employed in all the relevant provisions (UBBL/ER).

[41] The plaintiff's learned counsel, Mr Julian Chan Tjun Leung, had submitted that any breach of the relevant provisions (UBBL/ER) in itself could not amount to a tort of breach of statutory duty but such a breach could be considered by the court in determining whether the defendant had breached the duty of care in this case. Such a contention is clearly correct and is supported by the following three judgments of the High Court:

(1) in *KL Eco City Sdn Bhd v Tuck Sin Engineering & Construction SDN BHD & Anor* [2020] MLJU 435; [2020] 1 LNS 360, at [187] and [188], Lee Swee Seng J (as he then was) held as follows:

> [187] *Generally it is for the local authority only to enforce the [UBBL] and it is doubtful if a breach of by-law 80 [UBBL], which in any event had not been proved, would give rise a right of private action. See the case of X (minors) v. Bedfordshire County Council* [1995] 2 AC 633 *and the dicta of Lord Browne-Wilkinson at 731C-G.*

[188] *The plaintiff's claim for breach of statutory duties against the defendants is dismissed.* (Emphasis added.)

(2) the above judgment in *KL Eco City* had been followed in *Dua Residency MC*, at [100] and [101]; and

(3) it is decided in *Azman Karim & Anor v Hasa Arkitek Sdn Bhd & Ors* [2024] 2 MLRH 322, at [36(1)], [36(2)], [36(4)] and [42], as follows:

[36] *My understanding of cases regarding the tort of breach of statutory duty is as follows*:

(1) *whether an Act of Parliament (AP) has created a tort of breach of statutory duty is a matter of construction of the AP so as to ascertain the intention of Parliament. The issue is whether Parliament has intended an AP to confer a right of private action on a plaintiff when the defendant has breached a duty imposed by the AP* ...

(2) *a tort of breach of statutory duty may be imposed by Parliament through an AP in the following circumstances —*

(a) Parliament has intended in the AP to protect a particular class of persons [Protected Class (AP)] by imposing a duty on a defendant (not any other party) [Duty (AP)] — please refer to the 3-2 majority decision of Lord Carnwath JSC (concurred by Lord Mance and Lord Reed JJSC) in UK's Supreme Court in *Campbell v Peter Gordon Joiners Ltd* [2016] AC 1513, at [7] and [13];

(b) the defendant has breached the Duty (AP); and

(c) the defendant's breach of the Duty (AP) has caused injuries, damage and/or loss to the plaintiff who falls within the Protected Class (AP);

...

(4) *whether a plaintiff has a right of private action for a defendant's breach of duty imposed by a subsidiary legislation (SL), depends on whether Parliament has intended to confer such a right of private action on the plaintiff in the AP under which the SL is made (Enabling AP). In other words, the court has to construe the Enabling AP to ascertain whether the legislature has intended for a plaintiff to have a right of private action for a defendant's breach of duty imposed by the SL. This view is supported by the following judgment of Lord Jauncey in UK's House of Lords in R v Deputy Governor of Parkhurst Prison, Ex parte Hague* [1992] 1 AC 58*, at 168 and 171 (Hague's Case) —*

Hague appealed on the grounds (1) that a breach of the Prison Rules 1964 sounded in damages, ...

...

I find nothing in any of the other sections of the Act [Prison Act 1952] to suggest that Parliament intended thereby to confer on prisoners a cause of action sounding in damages in respect of a breach of those provisions. To give the Secretary of State power in section 47 to confer private law rights on

> *prisoners would therefore be to allow him to extend the general scope of the Act by rules. This could, of course, be done by some such provision as is found insection 76(2) of the Factories Act 1961 whereby the minister is specifically empowered to make regulations which 'impose duties on owners, employed persons and other persons …' However, in the absence of such a specific provision I conclude that it was not intended that the Secretary of State should be able to extend the scope of the Act by creating private rights by way of rules, from which it follows that had he done so he would have been acting ultra vires.*
>
> …
>
> [42] *The tort of negligence is a tort which is separate from the tort of breach of statutory duty. Despite the fact that I have decided that the Relevant AR Provisions (relevant provisions in the Architects Rules 1996) do not in themselves create a tort of breach of statutory duty [please refer to the above sub-para 37(1)(a)], in deciding the nature of the second defendant's duty (negligence) for the purpose of liability under the tort of negligence, the court may consider whether the contents of the Relevant AR Provisions form part of the second defendant's duty (negligence).* (Emphasis added.)

Premised on the judgment of Lord Jauncey in *Ex parte Hague*, I am of the view that any breach of the relevant provisions (UBBL/ER) in itself cannot form a basis for a claim for the tort of breach of statutory duty because a construction of the Street, Drainage and Building Act 1974 ('the SDBA') and the ESA, the enabling Acts of Parliament for UBBL and ER respectively, do not show Parliament's intention in SDBA and ESA to confer a right of private action on a plaintiff when the defendant has breached a duty imposed by the relevant provisions (UBBL/ER).

H(4). Court's evaluation of expert evidence

[42] Firstly, I find as a fact that PW6, PW7, DW2, DW3 and DW4 are experts in their own fields as understood in s 45(1) and (2) o the EA.

[43] Secondly, this court makes the following factual findings regarding the weight of the expert opinions of PW6, PW7, DW2, DW3 and DW4:

(1) I accept the expert testimonies of PW6 and PW7 in respect of the existence/cause (defects) because:

(a) PW6 had inspected the common property on two days, ie, 14 March 2107 and 15 March 2017;

(b) the electrical installations/services were inspected by PW7 on 14 March 2017;

(c) PW6 and PW7 had given sufficient reasons in the PIRA and at the trial regarding:

(i) the water seepages and their causes;

(ii) the defects (swimming/jacuzzi pools); and

(iii) the non-compliance (ER);

(d) photographs of the defects (condominiums) had been adduced to corroborate the expert evidence of PW6 and PW7 in this case; and

(e) the cross-examination of PW6 and PW7 had not disclose any reason for this court to reject their expert views.

(2) this court rejects the expert opinion of DW2 on the following grounds:

(a) DW2 did not inspect the condominium. In other words, DW2's expert testimony was not based on his own personal knowledge obtained from viewing first-hand the common property;

(b) DW2 gave a report dated 30 August 2021 (DW2's expert report). On the upper righthand corner of DW2's expert report are the words 'PRELIMINARY REPORT'. In other words, DW2's expert report had not been finalised; and

(c) as compared to the persuasive reasons given in PW6's expert opinion, DW2's expert report did not give any reason to deny the existence/cause (defects).

(3) I am not able to attach any weight to DW4's expert evidence due to the following reasons:

(a) notwithstanding the existence of the defects (condominium), DW4 disingenuously signed the CMGD on behalf of the project consultant architect on 1 September 2015 which stated that 'all defects at Common Area ... have been satisfactorily made good'. It is difficult for a court to believe an expert who has certified something which is not true;

(b) before giving DW4's expert testimony at the trial, DW4 did not inspect the common property; and

(c) in answer to question No 13 in DW4's witness statement, DW4 merely alleged that the PIRA (made in 2015) was 'outdated'. No reason, let alone cogent ones, were given by DW4 on why the court should accept DW4's expert evidence and reject PW6's expert opinion.

(4) I have no hesitation to reject DW3's expert view because:

(a) DW3 did not personally inspect the electrical installations/services;

(b) DW3 gave a report dated 28 August 2021 (DW3's expert report) which only gave '*comments*' on, among others, PW7's expert view in PIRA. PW7's reasons for the non-compliance (ER) were clear and compelling. It is to be noted that the non-compliance (ER) poses a continuous danger

to the parcel owners, occupants of the parcels and the property manager (parcel owners/occupants/property manager); and

(c) as testified by TP1, DW3 was previously employed by the third party ('DW3's involvement (condominium)') in respect of the electrical works in the condominium (Electrical works). Yet, DW3's Involvement (condominium) was not disclosed in DW3's 'Curriculum Vitae' in exh 'CFY1' annexed to DW3's affidavit affirmed under O 40A r 3 of the RC. Such a lack of candour on the part of DW3 had severely undermined his credibility as an independent expert witness.

H(5). Had plaintiff proven existence/cause (defects)?

[44] This court finds as a fact that the plaintiff had successfully discharged the legal and evidential burden to prove the existence/cause (defects) on a balance of probabilities. The following evidence and reasons support this factual decision:

(1) the expert evidence of PW6 and PW7 clearly proved the existence/cause (defects) — please refer to the above sub-para 43(1);

(2) as explained in the above sub-paras 43(2) to 43(4), the expert testimonies of DW2, DW3 and DW4 cannot be accepted by this court. Hence, the defendant had failed to rebut the expert opinions of PW6 and PW7 by way of the expert evidence of DW2, DW3 and DW4;

(3) when the parcel owners first complained to the defendant regarding the defects (condominium), the defendant's letter (3 September 2015) had the audacity to claim that certain defects (condominium) had been rectified and the other defects (condominium) were features of the condominium's 'overall design'!;

(4) the following letters had been sent to the defendant regarding the defects (condominium):

(a) the plaintiff's letter (6 April 2018);

(b) the plaintiff's letter (18 June 2018);

(c) the plaintiff's letter (25 June 2018); and

(d) the plaintiff's demand (28 June 2018) (to which a copy of the PIRA was attached).

The defendant did not reply, let alone deny, the contents of the above letters. Such an omission by the defendant is relevant under s 8(2) of the EA and is most telling. According to s 8(2) of the EA:

> *The conduct of any party*, or of any agent to any party, *to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto*, *and the conduct of any person an offence*

against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. (Emphasis added.)

(5) despite the filing of the original action against the defendant, the defendant did not apply to the plaintiff for permission for DW2, DW3 and/or DW4 to inspect the condominium so as to verify the existence/cause (defects).

[45] In view of the above proof of the existence/cause (defects), I make a consequential finding of fact that the defendant's breach had occurred.

H(6). Can defendant rely on CMGD?

[46] Contrary to the submission by the defendant's learned counsel, Dato' Shamesh a/l Jeevaratnam, I have no hesitation to decide that the defendant cannot rely on the CMGD to contend as follows:

(1) the defects (condominium) had been adequately rectified by the defendant; and

(2) consequently, the defendant had not breached the duty of care.

The CMGD was provided in the main construction contract between the defendant (as the condominium's developer) and the main contractor. The CMGD could constitute evidence of the defendant's rectification of the defects (condominium). However, as this court has found as a fact that the defects (condominium) existed and had not been rectified by the defendant (please refer to the above paras 43 and 44), I make a finding of fact that the contents of the CMGD were not true and had been rebutted by the expert testimonies of PW6 and PW7.

[47] As the contents of the CMGD were not true, the defendant should have instituted third party proceedings against the main contractor, project consultant architect and/or DW4.

H(7). Whether the defendant can rely on expiry of DLP?

[48] The DLP was provided in the SPAs between the parcel owners and defendant. As between a developer and parcel purchasers, the following cases have decided that the developer cannot rely on the expiry of the DLP to defeat the purchasers' claim under the SPAs against the developer:

(1) the judgment of Azmel Maamor JCA (as he then was) in the Court of Appeal case of *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87; [2008] 2 CLJ 284, at [24] to [26];

(2) See Mee Chun JCA's decision in the Court of Appeal in *Chrishanthini Angela Regina a/p Sebastiampillai v View Esteem Sdn Bhd* [2023] 1 MLJ 309; [2022] 1 LNS 2212, at [28], [30], [31] and [32]; and

(3) the High Court case of *Ooi Cheng Huat*, at [92(7)] and [93].

[49] If the defendant cannot raise a defence based on the expiry of the DLP which can defeat the claims of the parcel owners under the SPAs, *a fortiori*, the defendant cannot rely on the expiry of the DLP against the plaintiff in this case. This is because the original action is premised on the tort of negligence. By virtue of s 6(1)(a) of the Limitation Act 1953 ('the LA'), the plaintiff had a statutory right of six years to file this original action against the plaintiff based on the tort of negligence ('statutory six-year limitation period'). If I have accepted the expiry of the DLP as a defence to the defendant's breach, this will render redundant the statutory six-year limitation period as conferred by Parliament in s 6(1)(a) of the LA.

H(8). Whether the plaintiff's damage was caused by the defendant's breach

[50] Firstly, I am not able to accept the defence (wear and tear) is available to the defendant in this case because:

(1) according to the expert evidence of PW6 and PW7, the defects (condominium) were caused by the defendant's breach;

(2) as early as September 2015, the parcel owners had complained to the defendant regarding the defects (condominium); and

(3) the nature of the defects (condominium), namely, the water seepages, defects (swimming/jacuzzi pools) and non-compliance (ER) could not have been caused by ordinary wear and tear but by the defendant's breach.

[51] Secondly, I accept the submission by Mr Julian Chan that the amended defence ('AD') did not plead the defence (plaintiff's maintenance failure), ie, the AD did not plead that the plaintiff was guilty of contributory negligence in failing to take reasonable care to maintain and manage the common property. It is trite law that the defendant was bound by the AD. Furthermore, the defendant had failed to comply with the High Court's discovery order by not handing over the documents (s 15(3) of the SMA) to the plaintiff. Such a failure on the defendant's part, has made it difficult and continues to make it difficult for the plaintiff to maintain and manage the common property. As such, it is not just for the defendant to rely on the defence (plaintiff's maintenance failure) in this case.

[52] Thirdly, Dato' Shamesh had contended that the partial rectification

works constituted a *novus actus interveniens* which broke the chain of causation between the defendant's breach and the plaintiff's damage (chain of causation). As to what act or event can constitute a *novus actus interveniens* which breaks the chain of causation between a defendant's wrongful conduct and the plaintiff's loss or damage, I refer to the judgment of Abang Iskandar JCA (as he then was) in the Court of Appeal case of *Devan & Assoc (law firm wholly owned by Devan a/l Narayanan Raman) v TSR Bina Sdn Bhd* [2015] 3 MLJ 454; [2015] 5 CLJ 17, at [24]:

> [24] *The principle of novus actus interveniens, which is a Latin term, it means a new intervening act. It is an act or event that breaks the causal connection between a wrong committed by the defendant and subsequent happenings. The new event relieves the defendant from responsibility from the happenings. As to the effect of this defence of novus actus interveniens, we would only allude to the decision of Justice James Foong J (as he then was) in the case of Billion Origin Sdn Bhd v Newbridge Networks Sdn Bhd & Anor; Yap Burgess Rawson International Sdn Bhd (third party) [2006] 4 CLJ 113 at para (30) therein, where he had said*:
>
> > ... This concept of novus actus interveniens acts in this manner: If a particular consequence of the defendant's wrongdoing is attributable to some independent act or [24] *The principle of novus actus interveniens, which is a Latin term, it means a new intervening act. It is an act or event that breaks the causal connection between a wrong committed by the defendant and subsequent happenings. The new event relieves the defendant from responsibility from the happenings. As to the effect of this defence of novus actus interveniens, we would only allude to the decision of Justice James Foong J (as he then was) in the case of Billion Origin Sdn Bhd v Newbridge Networks Sdn Bhd & Anor; Yap Burgess Rawson International Sdn Bhd (third party) [2006] 4 CLJ 113 at para (30) therein, where he had said*:event which supersedes the effect of the initial tortious conduct, then the defendant's responsibilities may not extend to the consequences of the supervening event. In short, if there is a break in the chain of causation then the original wrongdoer is not liable for starting the wrong — see *Clerk & Lindsell on Torts*, 17th edition, para 2-24. (Emphasis added.)

This court is unable to accept the above submission that the partial rectification works constituted a *novus actus interveniens* which broke the chain of causation. My reasons are as follows:

(1) a victim of a tort has a duty to mitigate his or her loss, injury and/or damage caused by a tortfeasor ('duty to mitigate (damage)'). The duty to mitigate (damage) has been explained by the High Court in *Tropicana Golf & Country Resort Bhd v Loke Wei Kuen & Anor and other cases* [2022] MLJU 1969; [2023] 2 MLRH 453, at [50(2)], as follows:

> [50(2)] *S has a duty imposed by case law to take reasonable steps to mitigate S's loss/injury/damage, including mental distress, which has been caused by the tort committed against S. This is clear from the following appellate decisions:*
>
> (a) *in the Federal Court case of Yoong Leok Kee Corporation Sdn Bhd v Chin Thong Thai* [1981] 2 MLJ 21*, at 23, Abdul Hamid FJ (as he then was) has decided as follows:*

It is the appellant's contention that if the respondent had not left the hospital against medical advice and if he had the leg amputated and fitted with an artificial leg there would then be no future loss. The respondent, however, contended that even if the respondent had his leg amputated it is doubtful he could get $150 p.m. and assuming he could, the loss would still be around $450 p.m. and given 27 years' purchase he should be awarded a sum of $79,072.38 future loss of earnings.

The law is clear in that as enunciated by Viscount Haldane LC in British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Limited (House of Lords) [1912] AC 673, 689:

> *The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.*

Thus the onus falls upon the respondent to take all reasonable steps to mitigate the amount of damage. It is evident that the respondent acted unreasonably when he left the hospital against medical advice. If he had remained in the hospital to continue with the treatment even if it should become necessary to have the leg amputated, it was clear that he would be able to lead a normal healthy life.

(b) in *Goh Ah Ba v Mohamed Zain bin Sudin* [1987] 1 MLJ 119*, at 120, Syed Agil Barakbah SCJ has delivered the following judgment of the Supreme Court:*

> The trial Judge also took into consideration the respondent's failure to mitigate the damages by leaving the General Hospital on his own accord when he deducted 25% from respondent's monthly earning of $418 and his award of $41,617.05 under loss of future earnings calculated on the basis of $320 monthly earnings multiplied by sixteen years purchase. We are satisfied that he had not erred.

(2) the partial rectification works was undertaken by the plaintiff in fulfilment of the plaintiff's duty to mitigate (damage). In other words, the partial rectification works was not an independent act or event (independent of the tort of negligence committed by the defendant) which could constitute a *novus actus interveniens* that could sever the chain of causation.

[53] In view of the above reasons, I find as a fact that the plaintiff's damage was indeed caused by the defendant's breach.

I. SHOULD THE COURT DRAW ADVERSE INFERENCE?

[54] Dato' Shamesh had urged this court to draw an adverse inference under s 114(g) of the EA against the plaintiff due to the plaintiff's failure to call the property manager to give evidence at the trial. I am not able to accede to this contention. This is because firstly, an adverse inference may be drawn by the court under s 114(g) of the EA against a party for suppressing material evidence — please refer to the Supreme Court's judgment delivered by Mohd Azmi SCJ

in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, at p 494. The evidence of the property manager was not material to the original action because the property manager was not involved in any manner with the construction of the common property and the defects (common property). Hence, there was no suppression of material evidence by the plaintiff in this case which would justify the court to draw an adverse inference against the plaintiff for not calling the property manager to testify at the trial. Secondly, the defendant had a right to apply for a subpoena from the court to compel the property manager to testify in this case (as the defendant had done with regard to DW4). For reasons best known to the defendant, the defendant had elected not to apply for a subpoena to compel the property manager to give evidence at the trial.

[55] In view of the nature of the water seepages and defects (swimming/jacuzzi pools), the 'As-Built Drawings' and waterproofing warranty were material evidence in this case. Yet, the defendant did not adduce such material documents at the trial. Accordingly, I am constrained to make an adverse inference pursuant to s 114(g) of the EA against the defendant for suppressing the above material evidence in this case. It is to be noted that in civil cases, an adverse inference under s 114(g) of the EA may be made by the court against a defendant — please refer to the decision of Hashim Yeop Sani CJ (Malaya) in the Supreme Court case of *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33, at pp 34 to 35.

J. OUTCOME OF ORIGINAL ACTION

[56] Premised on the evidence and reasons stated in the above Parts H(1) to H(8) and para 55, the original action is allowed because the plaintiff has succeeded to discharge the legal and evidential burden under ss 101(1), (2) and 102 EA to prove on a balance of probabilities that the defendant is liable to the plaintiff for the defects (common property) based on the tort of negligence.

[57] As opined in *Ooi Cheng Huat*, at [126], the defendant should have instituted third party proceedings against the main contractor for an indemnity or contribution with regard to the water seepages and defects (swimming/jacuzzi pools).

K. EXTENT OF THE DEFENDANT'S LIABILITY TO THE PLAINTIFF

K(1). Measure of compensatory damages for tort of negligence

[58] In the Federal Court case of *Taiping Poly (M) Sdn Bhd v Wong Fook Toh (t/a Kong Wah Trading Co) & Ors* [2018] supp MLJ 312; [2011] 3 CLJ 837, at [18], Richard Malanjum CJ (Sabah and Sarawak) (as he then was) has explained that when a tortious claim is allowed by the court, the court should award a sum of compensatory damages which should, as nearly as possible, put

a victim of the tort in the same position as the victim would have been in if the tort had not been committed. This is in consonance with the general principle of *restitutio in integrum*.

K(2). Amount of compensatory damages to be awarded in favour of plaintiff in this case?

[59] In accordance with *Taiping Poly*, the following sums of compensatory damages are awarded by this court so as to put, as nearly as possible, the plaintiff, a victim of a tort of negligence committed by the defendant, in the same position as the plaintiff would have been in if the tort had not been committed by the defendant:

(1) the defendant shall pay the partial rectification cost to the plaintiff; and

(2) the defendant shall be liable to the plaintiff for the following sums of compensatory damages:

(a) the balance (rectification cost);

(b) the defendant's liability (ER); and

(c) the defendant's liability (plaintiff's loss of access/use/amenity).

K(3). Assessment of compensatory damages

[60] The amounts of the balance (rectification cost), the defendant's liability (ER) and defendant's liability (plaintiff's loss of access/use/amenity) shall be assessed by the learned Judicial Commissioner of the Shah Alam Construction Court ('JC') and not by the court registrar ('assessment (damages)'). The rationale for the assessment (damages) by the learned JC has been explained in *Sykt Faiza Sdn Bhd & Anor v Faiz Rice Sdn Bhd & Anor and another suit* [2019] 7 MLJ 175, at paras [142] and [143].

[61] The costs of the assessment (damages) ('costs (assessment)') shall be determined by the learned JC and shall be paid by the defendant to the plaintiff.

K(4). Interest on compensatory damages

[62] Section 11 of the Civil Law Act 1956 ('the CLA') and O 42 r 12 of the RC provide as follows:

s 11 CLA *Power of Courts to award interest on* debts and *damages*

In any proceedings tried in any Court for the recovery of any debt or *damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the* debt *or damages*

for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section —

(a) shall authorize the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

O 42 r 12 RC *Interest on judgment debts*

Subject to rule 12A, except when it has been otherwise agreed between the parties, *every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied.* (Emphasis added.)

[63] Pursuant to s 11 of the CLA and O 42 r 12 of the RC, I exercise my discretionary power to award interest at the rate of 5%pa on the partial rectification cost from 10 March 2020 (date of filing of SOC) until the date of full payment of the partial rectification cost by the defendant to the plaintiff.

L. WHETHER THE PLAINTIFF COULD CLAIM EXEMPLARY DAMAGES FROM THE DEFENDANT

[64] Mr Julian Chan had submitted that the court should impose exemplary or punitive damages on the defendant in this case as a consequence of the defendant's breach (High Court's discovery order).

[65] In the House of Lords case of *Rookes v Barnard* [1964] 1 All ER 367, at 410 to 411, Lord Devlin had decided that the court can only award exemplary damages in the following two categories of cases:

(1) where the conduct of a defendant was 'oppressive, arbitrary or unconstitutional'; and

(2) where a defendant's conduct had been calculated by the defendant to make a profit for the defendant which would exceed the compensation payable to the plaintiff
('two categories (*Rookes*)').

[66] The two categories (*Rookes*) had been followed by many Malaysian cases, eg, the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal in *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675, at pp 682 to 684.

[67] I am not able to award exemplary damages to the plaintiff due to the defendant's breach (High Court's discovery order). Firstly, any breach of a judgment or order of the court (judgment/order) does not fall within the two categories (*Rookes*). Secondly, if there is non-compliance with a judgment/order in favour of a party (R), R has every right to enforce or execute the judgment/order. Lastly, the SOC did not pray for exemplary damages to be awarded against the defendant in this case.

M. THE THIRD PARTY PROCEEDINGS

[68] By way of a letter dated 1 October 2005, the defendant appointed the third party as the M&E consultant for the electrical works ('contract (defendant-third party)').

[69] According to TP1, the third party had appointed Dexon Electrical Engineering Sdn Bhd (Dexon) to perform the Electrical Works.

[70] The drawings for the electrical works ('drawings (electrical works)') were submitted by the third party for the approval by the relevant authorities. One IR. Yang Geok Seng ('IR Yang') signed the Drawings (Electrical Works) on behalf of the third party.

[71] I accept the submission by Dato' Shamesh that the third party shall indemnify the defendant in respect of the defendant's liability (ER) ('third party's liability (defendant)'). This decision is premised on the following evidence and reasons:

(1) the third party had a contractual obligation under contract (defendant-third party) to ensure that, among others, the electrical works complied with the ER ('third party's contractual obligation (defendant)'). As this court has accepted PW7's expert opinion regarding the non-compliance (ER), the third party had therefore breached the third party's contractual obligation (defendant) (third party's contractual breach). The third party's contractual breach is the first ground for the third party's liability (defendant);

(2) despite the existence of the contract (defendant-third party), the third party owed to the defendant under the tort of negligence a duty to take all reasonable care to ensure that the electrical works complied with the ER (third party's duty of care). I rely on the following judgment of the Federal Court in *Lok Kok Beng*, at [29]:

> [29] Tortious liability arises from a wrongful act where the common law imposes a duty to take reasonable care. It is settled law that despite the existence of a contractual relationship between parties in an action, liability in negligence extends

beyond the contractual obligations (*Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283; [1984] 1 LNS 168). (Emphasis added.)

Premised on PW7's expert view on the non-compliance (ER), I find as a fact that the third party's duty of care had been breached in this case (third party's negligence). The third party's negligence constitutes the second ground for the third party's liability (defendant);

(3) with regard to the non-compliance (ER), the third party was a tortfeasor. This attracts the application of s 10(1) and (2) of the CLA. I reproduce below the relevant part of s 10(1) and (2) of the CLA:

s 10 *Proceedings against, and contribution between, joint and several tortfeasors*

(1) *Where damage is suffered by any person as a result of a tort (whether a crime or not)* —

...

(c) *any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.*

(2) *In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage, and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.*

This court unhesitatingly decides that by virtue of s 10(1) and (2) of the CLA, the third party shall indemnify the defendant in respect of the defendant's liability (ER);

(4) TP1 candidly admitted that he had no personal knowledge of the electrical works. In this case, IR. Yang signed the drawings (electrical works) on behalf of the third party. It was clear that IR. Yang was a material witness in the third party proceedings on the non-compliance (ER).

The third party did not adduce any evidence on why the third party could not have obtained a subpoena to compel IR. Yang to testify in the third party proceedings. Hence, I draw an adverse inference under s 114(g) of the EA against the third party in favour of the defendant on the ground that the third party had suppressed material evidence with regard to the third party's failure to call IR. Yang to testify in the third party proceedings; and

(5) during cross-examination of TP1, he had frankly admitted that if the defendant was liable to the plaintiff in the original action in respect of the non-compliance (ER), the third party should indemnify the defendant of the same.

[72] As the defendant's liability (ER) is adjudged by this court to be assessed by the learned JC at the assessment (damages), the third party is entitled to appear and take part in the assessment (damages) with regard to the quantum of the defendant's liability (ER) (for which the third party is liable to indemnify the defendant).

[73] In respect of the costs of the assessment (damages) between the defendant and third party ('assessment costs (defendant-third party)'), the learned JC has the unfettered discretion to determine the sum of the assessment costs (defendant-third party).

[74] As the third party had appointed Dexon to undertake the electrical works, the third party should have instituted fourth party proceedings against Dexon for an indemnity or contribution in respect of the third party's liability (defendant).

N. COSTS

[75] The court has an unfettered discretion under O 59 rr 2(2), 3(2), 16(2), (3), 19(1) and (2) of the RC to award costs after the trial.

[76] With regard to the costs for the original action, I determine a sum of RM130,000 (subject to allocatur fee) ('costs (original action)') to be paid by the defendant to the plaintiff. This amount of costs (original action) is determined on a 'standard basis' after considering the following matters:

(1) the plaintiff had to call two experts in this case, namely, PW6 and PW7, to succeed in the original action against the defendant;

(2) the original action involved many documents — please refer to O 59 r 16(1)(c) of the RC;

(3) this case is important to the plaintiff because the non-compliance (ER) poses a danger to the parcel owners/occupants/property manager — please see to O 59 r 16(1)(e) of the RC; and

(4) the high amount of the plaintiff's claim is relevant according to O 59 r 16(1)(f) of the RC.

[77] As between the defendant and third party, the third party shall

contribute 25% of the costs (original action) in favour of the defendant, namely, a sum of RM32,500 ('costs (third party proceedings)').

O. THE COURT'S DECISION

[78] Premised on the above evidence and reasons, the following judgment is entered in this case:

(1) with regard to the original action:

(a) a declaration is granted that in this case, the defendant had breached s 15(3) SMA;

(b) the defendant shall pay to the plaintiff the partial rectification cost with interest at the rate of 5%pa on the partial rectification cost from 10 March 2020 (date of filing of SOC) until the date of full payment of the partial rectification cost;

(c) the defendant shall pay to the plaintiff the following sums to be assessed by the learned JC:

(i) the balance (rectification cost);

(ii) the defendant's liability (ER); and

(iii) the defendant's liability (plaintiff's loss of access/use/amenity).

(d) the defendant shall pay the costs (original action) to the plaintiff; and

(e) as between the plaintiff and defendant, the costs (assessment) shall be determined by the learned JC and shall be paid by the defendant to the plaintiff; and

(2) in respect of the third party proceedings:

(a) the third party shall indemnify the defendant in respect of the defendant's liability (ER);

(b) the third party shall pay the costs (third party proceedings) to the defendant; and

(c) the assessment costs (defendant-third party) shall be determined by the learned JC.

Order accordingly

Reported by Dzulqarnain Ab Fatar